

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 4:04 CR 578 ERW  
 ) DDN  
 FERMIN VINCENTE-HERNANDEZ, )  
 )  
 Defendant. )

This action is before the Court upon the pretrial motions of the parties, which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). An evidentiary hearing was held on November 12, 2004.

**FACTS**

<sup>1</sup>The undersigned takes judicial notice of the fact that Foristell is in St. Charles County, Missouri. Fed. R. Evid. 201.

<sup>2</sup>A vehicle following another vehicle too closely violates Missouri state traffic laws. See Mo. Rev. Stat. § 304.017 (2000).

shoulder of the highway, approached it on the passenger side, and spoke with the driver.

2. Officer Lineback asked for the driver's identification. The driver identified himself as David Hernandez;<sup>3</sup> the other two occupants were women. Lineback explained the reason for the stop: the Malibu had been following a vehicle too closely. Hernandez said he would be more careful, and gave Lineback a Mexican driver's license in the name "David Hernandez." The front seat passenger, identified as Olga Ramos, handed Lineback the Malibu's title and registration documents which were in the name of Sophia Hernandez, the back seat passenger.

3. During this conversation, Officer Lineback smelled a very strong odor of what seemed to him to be glue, which was unusual for an ordinary traffic stop. He asked the driver about the smell and the driver responded by stating that he did not know what the officer was talking about, indicating that he did not smell the strong odor that the officer smelled; Lineback thought this response was odd and false. Lineback saw that the driver was wearing a tightfitting, sleeveless shirt and was sweating profusely, which the officer felt was unusual, because of the season of the year, the time of day, and the ambient temperature. The officer also saw that the two passengers appeared nervous; except when Ms. Ramos handed him the vehicle's documents, they never looked at him, spoke to him, or acknowledged his presence.

4. Officer Lineback asked the driver where he was headed and where he had come from. The driver said he was going to Kentucky to visit family and that they had driven from the Denver area. Lineback then recalled that two weeks earlier he had participated in a St. Charles County law enforcement stop of a Malibu automobile (although a different year and color), which was being driven from Colorado to Kentucky. The officers then encountered a very strong smell of glue and found 115 pounds of marijuana inside that Malibu. Officer Lineback also knew that Colorado was a transshipment area for the transportation of controlled substances through Missouri.

---

<sup>3</sup>The driver was later identified as Fermin Vincente-Hernandez, defendant herein. See infra Finding 10.

5. Next, Officer Lineback returned the license to the driver and asked him whether he could search the automobile. The driver said, "Go ahead." The officer also asked Sophia Hernandez, named on the title and registration of the automobile, whether he could search the car. She, too, answered in the affirmative.

6. Next, Officer Lineback obtained Shadow from the police car and conducted a walk-around of the Malibu with the dog. Shadow alerted to the front wheelwells, indicating that controlled substances were present in that area. Lineback then opened the front passenger door and saw carpeting and a black trash-type bag in an opened hidden compartment in the front passenger area, near where the drug dog had alerted. Officer Lineback then contacted a St. Charles County police drug canine unit, which arrived and conducted another dog sniff of the Malibu with the same result: The second dog alerted to the same area. Because the vehicles were parked along a busy interstate highway, Officer Lineback asked the driver to drive the Malibu behind the police to the police station. The driver complied, following the police to the station about five miles away.

7. At the police station, a thorough search of the Malibu was conducted, including the secret compartment area, but no contraband was found. The police notified the federal Drug Enforcement Administration (DEA) of the vehicle stop. Soon thereafter, while the Malibu was still being searched, three DEA Special Agents, including Steve Kinnard and Scott Stricher arrived, looked over the Malibu (which was up on jacks), photographed it (for future identification purposes), and interviewed the three occupants of the Malibu.

8. Agent Kinnard spoke with the driver, still known as David Hernandez. Kinnard asked Hernandez how long he had been in the United States. Hernandez said he had entered the country illegally. After speaking with the three subjects, Kinnard spoke by telephone with federal Immigration and Customs Enforcement (ICE) Special Agent Todd Ostrum about the Malibu occupants' legal status in the United States. During the conversation, Ostrum ran the subjects' names through his computer. He found that the two women had computer entries; however, he could find nothing on "David Hernandez." Ostrum asked to speak with the driver;

Kinnard gave the telephone to Hernandez. Ostrum asked Hernandez whether he could speak English and Hernandez answered in the affirmative. They then conversed in English. Ostrum asked Hernandez his name, his country of origin, whether he had any immigration documents, and how he last came into the United States. Hernandez said he was from Mexico, he had no immigration documents, and that he had come into the United States illegally from Mexico. When the telephone was returned to Kinnard, Ostrum told Kinnard that Hernandez was in the United States illegally and that Kinnard should arrest him for this reason. At this time Agent Kinnard formally placed the driver under arrest.<sup>4</sup>

9. Next, driver Hernandez was conveyed to the ICE office in St. Louis where Agent Ostrum interviewed him. There he gave driver Hernandez a written notice of immigration law rights form printed in the Spanish language, Gov. Ex. 2.<sup>5</sup> The form explained the driver's rights to a hearing on his immigration status, that he would be either kept in custody or released on bond pending the hearing, that he could request to be returned to his native country immediately, that he had the right to be represented by an attorney at the hearing, that he had the right to communicate with consular or diplomatic officers of his country, and that he could use a telephone to speak with a lawyer, or other representative, or consular representative before his departure from the United States. Gov. Exs. 2, 2A. Hernandez said he understood the form and signed it at 1:50 p.m., indicating thereby that he admitted he was in the United States illegally, that he believed he would not face harm by being returned to his country, that he gave up his right to a hearing before the Immigration Court, that he wished to return to his country as soon as arrangements could be made, and that he understood he would be detained until his departure. Id.

10. Later that day, Agent Ostrum, through a fingerprint identification system, learned that the driver's true name was Fermin Vincente-Hernandez, and that he had been deported previously.

---

<sup>4</sup>Ultimately, the female occupants were not arrested and were allowed to depart the police station.

<sup>5</sup>The same type form, printed in the English language, was offered and received into evidence as Gov. Ex. 2A.

11. Thereafter, Agent Ostrum advised Vincente-Hernandez of his constitutional rights to remain silent and to counsel. This was done orally and in writing; Ostrum gave Vincente-Hernandez a Spanish-written warning and waiver of rights form to read. Then, Ostrum read the form to him in Spanish. Gov. Ex. 1.<sup>6</sup> Vincente-Hernandez said he understood his rights. Ostrum asked him to sign the form, but Vincente-Hernandez just sat there without saying anything. Ostrum said he knew Vincente-Hernandez had been deported before and that he knew his true identity. Ostrum then said he wanted to talk with him about the hidden compartment in the car. Vincente-Hernandez said he did not know anything about the compartment. Vincente-Hernandez then shook his head, indicating that he did not want to make any more statements, and said he did not want to sign the form. At that time, the agent ended the interview.

### **DISCUSSION**

#### **The traffic stop**

Defendant argues that the initial traffic stop was illegal and that the only reason the officer stopped the Malibu was because the driver was Hispanic.

Officer Lineback observed the Malibu automobile violate Missouri traffic laws by following the vehicle in front too closely and, for this reason, he had probable cause to initiate a traffic stop.<sup>7</sup> United States v. Brown, 345 F.3d 574, 578-80 (8th Cir. 2003); United States v. Linkous, 285 F.3d 716, 719-20 (8th Cir. 2002). Once he made the traffic stop, he was authorized to check the driver's license and the vehicle's registration, and ask the driver about his destination and purpose. United States v. Bloomfield, 40 F.3d 910, 915 (8th Cir. 1994) (en banc), cert. denied, 514 U.S. 1113 (1995).

While it "is well established that a roadside traffic stop is a 'seizure' within the meaning of the Fourth Amendment . . . [f]or purposes

---

<sup>6</sup>The same type form, printed in the English language, was offered and received into evidence as Gov. Ex. 1A.

<sup>7</sup>There was no substantial evidence offered at the hearing which indicated that the officer stopped the Malibu because the driver or occupants were Hispanic.

of constitutional analysis, a traffic stop is characterized as an investigative detention, rather than a custodial arrest." United States v. Jones, 269 F.3d 919, 924 (8th Cir. 2001). "As such, a traffic stop is governed by the principles of Terry v. Ohio, [392 U.S. 1 (1968)]." Id.

Ordinary traffic stops are not considered sufficiently coercive in nature to require that persons who are temporarily detained during a traffic stop be considered "in custody" for the purposes of Miranda v. Arizona, 384 U.S. 436 (1966). United States v. Pelayo-Ruelas, 345 F.3d 589, 592 (8th Cir. 2003); United States v. Rodriguez-Arreola, 270 F.3d 611, 617 (8th Cir. 2001).

Thus, the statements made by defendant Vincente-Hernandez during the stop should not be suppressed.

#### The search of the Malibu

The traffic stop purposes ended when Officer Lineback returned the Mexican driver's license to Vincente-Hernandez. Jones, 269 F.3d at 925. However, he was authorized to ask for permission to search the Malibu, because he had a reasonable suspicion that the vehicle was being used to commit a drug crime. Id.; United States v. Pereira-Munoz, 59 F.3d 788, 791-92 (8th Cir. 1995).

When Lineback first spoke with Vincente-Hernandez, he smelled an unusually strong odor of glue emanating from the vehicle. When questioned about the odor, Vincente-Hernandez responded that he did not know what Lineback was talking about. Vincente-Hernandez was then wearing a tight-fitting, sleeveless shirt and was sweating profusely, which was unusual for the temperature, the season, and the time of day. The two passengers acted in an unusual manner, generally ignoring him. Vincente-Hernandez said they were traveling from Colorado to Kentucky, which the officer knew was the origin and destination of a Malibu automobile which, two weeks earlier, had been similarly associated with a strong odor of glue and was discovered carrying 115 pounds of marijuana. Finally, the officer knew that Colorado was a transshipment area for the transportation of controlled substances through Missouri. Therefore, he was authorized to expand the scope of the traffic stop.

See Linkous, 285 F.3d at 720 ("An officer's suspicion of criminal activity may reasonably grow over the course of a traffic stop as the circumstances unfold and more suspicious facts are uncovered."); United States v. Barahona, 990 F.2d 412, 416 (8th Cir. 1993) ("[I]f the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions.").

While the temporary detention of the traffic stop properly evolved into a temporary detention for investigating the reasonable suspicion of drug law violations, the circumstances of the detention became no more custodial or coercive than before and did not trigger the Malibu occupants' Miranda rights. Pelayo-Ruelas, 345 F.3d at 592.

The consent to search the Malibu was given voluntarily by Vincente-Hernandez and Sophia Hernandez. A warrantless search is authorized by the voluntary consent of someone who has authority over the place to be searched. Illinois v. Rodriguez, 497 U.S. 177, 179, 189 (1990). Whether consent was voluntarily given depends upon the totality of the circumstances. United States v. Heath, 58 F.3d 1271, 1276 (8th Cir.), cert. denied, 516 U.S. 892 (1995). Consent is voluntary if it is the product of an "essentially free and unconstrained choice by its maker[.]" Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973); United States v. Bradley, 234 F.3d 363, 366 (8th Cir. 2000).

In the case at bar, Officer Lineback merely asked whether he could search the automobile. Both Vincente-Hernandez and Sophia Hernandez clearly consented. No evidence was offered indicating that the subjects objected to the search, the officer's observation of the interior secret compartment, or the dog examination, or that the officer overbore or compelled their consent.

The use of the trained dogs to sniff the exterior of the vehicle also did not violate the Fourth Amendment. United States v. Place, 462 U.S. 696, 707 (1983); United States v. Harvey, 961 F.2d 1361, 1362-63 (8th Cir.), cert. denied, 506 U.S. 883 (1992). A drug dog alerting to a vehicle provides probable cause to believe it contains drugs. Bloomfield, 40 F.3d at 919. The dog alerts were corroborated by Officer Lineback's observation of the hidden compartment inside the Malibu.

The officer also was authorized to ask defendant to drive the Malibu to the police station for a thorough search. See United States v. Casares-Cardenas, 14 F.3d 1283, 1286 (8th Cir.) ("[O]nce a reasonable basis for search of an automobile has been established, the search need not be completed on the shoulder of the road."), cert. denied, 513 U.S. 849 (1994); cf. Leffler v. United States, 409 F.2d 44, 49 (1969).

The information learned by the officer in the search of the Malibu at the scene of the stop should not be suppressed.

#### DEA interview at the station

A fundamental issue before the court is whether Vincente-Hernandez's statements about his immigration status, made in response to questions by DEA Agent Kinnard and then by ICE Agent Ostrum, were non-custodial in nature (not implicating the Fifth Amendment right to Miranda<sup>8</sup> warnings), or were custodial interrogations (necessitating Miranda warnings). The undersigned concludes that the statement to Agent Kinnard was made within the scope of the initial traffic stop, lawfully extended to include a temporary detention to investigate drug law violations, and under non-custodial circumstances.

Vincente-Hernandez's statements to the DEA agents should not be suppressed.

#### ICE interview on telephone

At the police station, because no illicit drugs were found inside the Malibu, the focus of the investigation changed from drug law violations to whether the occupants had violated the federal immigration laws.

Given the totality of the circumstances, the undersigned concludes that the officers had a reasonable suspicion that the occupants of the Malibu were violating the federal immigration laws, sufficient to authorize an inquiry into the length of time Vincente-Hernandez has been in the United States. Specifically, Vincente-Hernandez produced a Mexican driver's license and no United States identification, there were

---

<sup>8</sup>Miranda v. Arizona, 384 U.S. 436 (1966).

two positive canine alerts, there was an unusual odor in the vehicle, the occupants appeared nervous, and the vehicle contained a hidden compartment.

While any of these circumstances individually may not amount to reasonable suspicion Vincente-Hernandez violated federal immigration laws, the undersigned is persuaded that, collectively, they amount to reasonable, articulable facts of immigration law violations authorizing a constitutionally permissible extension of the initial traffic stop. United States v. Johnson, 64 F.3d 1120, 1124 (8th Cir. 1995) ("Reasonable suspicion is based on the totality of the circumstances."), cert. denied, 516 U.S. 1139 (1996).

Although the scope of the traffic stop was permissibly expanded, it must remain non-custodial for there to be lawful interrogation without the officer giving defendant his Miranda warnings. Cf. United States v. Rodriguez-Hernandez, 353 F.3d 632, 634-35 (8th Cir. 2003) ("The district court concluded the scope of the traffic stop was not impermissibly expanded when [defendant] was instructed to speak with Border Patrol about her immigration status. Nevertheless, the court held the Border Patrol conversation was custodial, and thus, the conversation should have been preceded by Miranda warnings.").

Courts must assess the "totality of the circumstances" when determining if an individual is "in custody" for the purposes of Miranda. United States v. Axsom, 289 F.3d 496, 500 (8th Cir. 2002). Custody occurs when a suspect is deprived of his freedom of action to a degree associated with a formal arrest. United States v. Galceran, 301 F.3d 927, 929 (8th Cir. 2002). There are six common indicia of custody which tend either to mitigate or aggravate the atmosphere of custodial interrogation. The indicia are:

(1) whether the suspect was informed that the suspect was free to leave or that the suspect was not under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether police used strong-arm tactics or deceptive stratagies during questioning; (5) whether the atmosphere of the questioning was police-dominated; and (6) whether the suspect was arrested at the end of the questioning.

Id.; see also United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990).

The undersigned believes Vincente-Hernandez's discussions with the DEA agents and with Agent Ostrum on the telephone were not custodial. While he was not told at the time of the interrogation that the questioning was voluntary, that he was free to go, that he could ask to leave, or that he was not considered under arrest, neither was he told he could not leave. There is no indication the agents used strong-armed tactics to obtain Vincente-Hernandez's cooperation and statements about his immigration status. On the contrary, Vincente-Hernandez was asked how long he had been in the country, and he volunteered that he entered illegally. Moreover, Vincente-Hernandez followed the officers to the police station without coercion for the vehicle search, and he was not arrested after the conversation with the DEA agents, but after his arrest was directed by ICE Agent Ostrum. While the questioning occurred at the police station, that in and of itself was not so inherently coercive or police-dominated to automatically equate to "custody." United States v. Galceran, 301 F.3d at 931 ("Miranda warnings need not be imposed simply because the questioning takes place in a police station.").

Once DEA Agent Kinnard permissibly asked Vincente-Hernandez how long he had been in the United States, and when Vincente-Hernandez responded that he was in this country illegally, the officer undoubtedly had probable cause to arrest him for violating federal immigration law. Pelayo-Ruelas, 345 F.3d at 593 ("[The] Agent . . . no doubt had probable cause to arrest [defendant] when he admitted being an illegal alien.").

After the DEA questioning, the undersigned finds the statements made to ICE Agent Ostrum on the telephone also should not be suppressed. From the questions from one agent to the next, Vincente-Hernandez's circumstances did not change to establish custody. After admitting he was in the country illegally, Agent Kinnard had reason to believe Vincente-Hernandez was in violation of the law other than the initial traffic stop. Upon receiving notice of the situation, Agent Ostrum was unable to verify Vincente-Hernandez's proffered identity (David Hernandez) in the consulted computer database. Therefore, Agent Ostrum had reason to believe, based on the identity check and Vincente-

Hernandez's statement to Agent Kinnard that he was in the country illegally, that he was committing a crime other than the traffic law violation. Nevertheless, all Agent Kinnard did was hand the telephone to defendant. Nothing in the facts indicated that defendant was being required to speak with the immigration agent.

Vincente-Hernandez knew he had just admitted his illegal status. However, that factor does not render the continued interrogation custodial, absent "restraints comparable to those associated with a formal arrest." Pelayo-Ruelas, 345 F.3d at 592. There is no doubt that the telephone questioning by Agent Ostrum was "interrogation" for Miranda purposes, because it was reasonably designed to elicit incriminating information from Vincente-Hernandez (i.e., that he was illegally in the United States). See Rhode Island v. Innis, 446 U.S. 291, 301 (1980); United States v. Lawrence, 952 F.2d 1034, 1036 (8th Cir.), cert. denied, 503 U.S. 1011 (1992). However, the telephone interrogation was not custodial, not until Agent Kinnard then formally arrested defendant.

#### ICE pre-Miranda interview

Thereafter, at the ICE office, Agent Ostrum advised Vincente-Hernandez of his immigration law rights and elicited information from him about his immigration status. This procedure was "interrogation" for Miranda purposes, because it was reasonably designed to elicit incriminating information from him about his illegal status in the United States. See Innis, 446 U.S. at 301; Lawrence, 952 F.2d at 1036. And this conversation was not preceded by the Miranda warnings about the constitutional rights to remain silent and to counsel.

These statements by defendant should be suppressed.

#### ICE post-Miranda interview

After Agent Ostrum later the same day advised defendant of his Miranda warnings, orally and in writing, Vincente-Hernandez made a statement indicating ignorance of the secret compartment, before invoking his right to remain silent. Defendant's post-Miranda statement should not be suppressed. It clearly was not compelled or coerced or otherwise involuntary, and it followed his being advised of his rights. Colorado

v. Connelly, 479 U.S. 157, 169-70 (1986); United States v. Jordan, 150 F.3d 895, 898 (8th Cir. 1998), cert. denied, 526 U.S. 1010 (1999).

The fact that these statements followed those made by defendant during the immigration law rights conversation does not compel suppression. This is not a "question-first" situation rejected by the Supreme Court in Missouri v. Seibert, 124 S. Ct. 2601 (2004), wherein that Court condemned the intentional procedure of conducting custodial interrogation without warning the subject of his Miranda rights, then re-interrogating him after an administration of these rights. The proper analysis was expressed:

The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as Miranda requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with Miranda, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Missouri v. Seibert, 124 S.Ct. at 2610. In Vincente-Hernandez's case, the two conversations each involved a different purpose, the first an advice of rights regarding his immigration status and the second an investigation of his criminal liability. No evidence indicated that advising defendant of his immigration law rights first was intended to circumvent the protections of being informed about his Miranda rights. Further, the answers to the questions posed by the Supreme Court in Seibert are all in the affirmative, because Vincente-Hernandez in fact invoked his right to remain silent.

Whereupon,

**IT IS HEREBY RECOMMENDED** that the motion of defendant to suppress evidence and statements (Doc. 16) be sustained as to the statements made by defendant to Agent Ostrum as described in Finding 9. In all other respects the motion should be denied.

The parties are advised they have ten (10) days to file written objections to this Report and Recommendation. The failure to file objections may result in a waiver of the right to appeal issues of fact.

A handwritten signature in black ink, reading "David D. Noce". The signature is written in a cursive style with a large, sweeping initial "D".

**DAVID D. NOCE**  
**UNITED STATES MAGISTRATE JUDGE**

Signed this 29th day of November, 2004.